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EXAMINER

CRAIG, PAULA L

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DENNIS OSAMU HIROTSU

Appeal 2009-0490
Application 11/130,674
Technology Center 3700

Decided:¹ March 23, 2009

Before DONALD E. ADAMS, ERIC GRIMES, and FRANCISCO C.
PRATS, *Administrative Patent Judges*.

GRIMES, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims 1-18, all of the pending claims, which are directed to a disposable absorbent product.

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

The Examiner has rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

Claim 1 is representative of the appealed claims and reads as follows:

Claim 1: A disposable absorbent product, comprising:
a package having at least one window and an outer surface; and
a plurality of disposable absorbent articles contained in the package,
the plurality of disposable absorbent articles including one type of absorbent article

wherein said type of absorbent article has a predetermined absorbency which is identified by an indication means disposed on the respective absorbent article,

said indication means comprising a color wherein said color indicates the predetermined absorbency, wherein the indication means of said absorbent articles can be seen through the at least one window.

The claims stand rejected under 35 U.S.C. § 103(a) as being obvious as follows:

- claims 1-4, 6, and 9 in view of Sorkin² and Seitz³;
- claims 1-6 and 8-13 in view of MacDonald⁴ and Seitz; and
- claims 7 and 14-18 in view of MacDonald, Seitz, and Roach.⁵

OBVIOUSNESS I

Issue

The Examiner has rejected claims 1-4, 6, and 9 under 35 U.S.C. § 103(a) as being obvious in view of Sorkin and Seitz. The claims have

² Sorkin, Des. 312,208, Nov. 20, 1990.

³ Seitz et al., US 6,488,202 B1, Dec. 3, 2002.

⁴ MacDonald et al., US 5,967,665, Oct. 19, 1999.

⁵ Roach et al., US 5,413,568, May 9, 1995.

been argued in two groups: claim 9 is argued separately, and claims 2-4 and 6 stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(vii).

The Examiner's position is that Sorkin discloses a package having a window and containing a "plurality of absorbent articles" identified by color as an indication means (Ans. 3-4). The Examiner finds that Seitz discloses "that different colors may be used to signify different sizes of disposable diapers" and that "'size' and 'absorbency' in regard to absorbent articles are considered by the Examiner to be generally equivalent terms" (*id.* at 4). The Examiner concludes that,

Given that Sorkin teaches different diaper colors, it would have been obvious to one of ordinary skill in the art at the time of the invention for the diapers of Sorkin to be disposable, and for the color of the diaper to correspond to a predetermined absorbency ... to improve the reliability of size identification and indicate the size of the product by color association, as taught by Seitz.
(*Id.* at 5.)

Appellant contends that the Examiner erred in finding that one of skill in the art would be motivated to combine the references because "the skilled person must be motivated at least to modify Sorkin to have articles having differing predetermined absorbencies; with the color being an indication of the predetermined absorbency" (Appeal Br. 6) and Seitz's "use of different colors on a color chart to distinguish sizes is far removed from the suggestion of using colors on the articles themselves" (*id.*).

The issue with respect to this rejection is: Does the evidence of record support the Examiner's conclusion that one of skill in the art would have been motivated to combine Sorkin's colored diapers, visible through a window, with Seitz's use of color as an absorbency indicator?

Findings of Fact

1. Sorkin's Figures 1 and 2 are shown below.

Fig. 1.

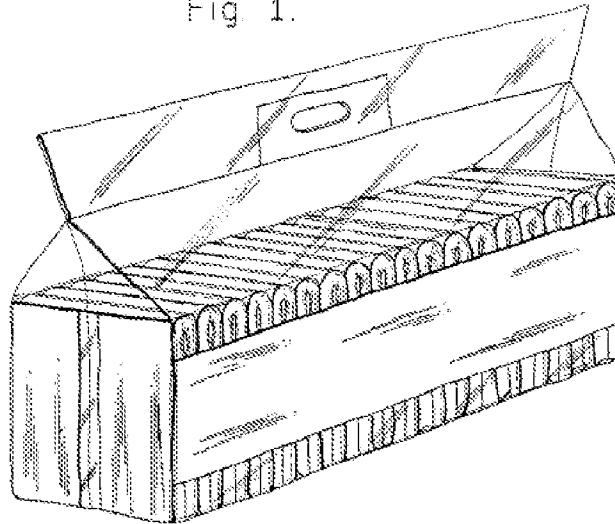


Fig. 2.

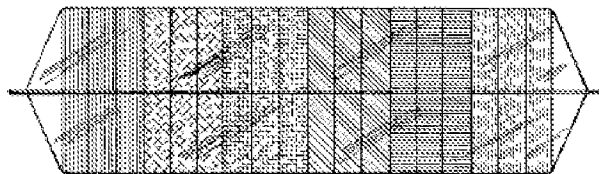


Figure 1 is said to show “a top perspective view of a package of diapers ... wherein the symbols indicating colors have been omitted” and Figure 2 is said to show a top plan view of the package of diapers (Sorkin 1).

2. Seitz discloses “a device and method for identifying a size of disposable diaper or other absorbent article which is fit-appropriate for a potential wearer of the diapers or other article” (Seitz, col. 3, ll. 27-30).

3. Seitz discloses that “[r]eferences to identifying a ‘size’ is used herein to include a direct or indirect identification of a garment disposable diaper or other absorbent article size, such as by number or letter (for example, ‘Size 3’ or ‘Size A’) ..., [or] by color association (for example, use

of one color to signify one size and a different color to signify a different size)” (*id.* at col. 3, ll. 58-65).

4. Seitz discloses that the “invention is applicable to other absorbent articles such as ... feminine hygiene garments” (*id.* at col. 3, ll. 47-52).

Principles of Law

“The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, ___, 127 S. Ct. 1727, 1739 (2007). “[W]hen the question is whether a patent claiming the combination of elements of prior art is obvious,” the answer depends on “whether the improvement is more than the predictable use of prior art elements according to their established functions.” *Id.* at ___, 127 S. Ct. at 1740.

The obviousness analysis “can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *Id.* at ___, 127 S. Ct. at 1741.

Analysis

Claim 1 is directed to a product comprising a package, with a window, that contains disposable absorbent articles having a color that identifies a predetermined absorbency of the articles and can be seen through the window.

Sorkin discloses a diaper package that has a window and colored diapers, with the colored diapers visible through the window. Seitz discloses that diaper size, i.e., absorbency, may be identified by “direct or indirect identification of a garment disposable diaper ... size, such as by ... color

association (for example, use of one color to signify one size and a different color to signify a different size)” (Seitz, col. 3, ll. 58-65). In view of these disclosures, it would have been obvious to one of skill in the art to modify the Sorkin diaper package to have the color of the diapers, viewable through the window, indicate a particular absorbency because doing so would provide the product with a readily recognizable absorbency indicator.

Appellant argues that “[t]o make the claimed invention, the skilled person must be motivated at least to modify Sorkin to have articles having differing predetermined absorbencies; with the color being an indication of the predetermined absorbency” (Appeal Br. 6) and that the “different colors of Sorkin do not make the articles different ‘types’ as claimed” (*id.*).

This argument is not persuasive. Claim 1 requires that the package contains a “plurality of disposable absorbent articles including one type of absorbent article.” Thus, claim 1 does not require that the package include more than one type of absorbent article. For the reasons discussed above, the combination of Sorkin and Seitz would have made obvious the claimed package including at least one type of absorbent article.

Appellant further argues that Seitz’s “use of different colors on a color chart to distinguish sizes is far removed from the suggestion of using colors on the articles themselves” (Appeal Br. 6) and that “[c]olors on a color chart are used simply to aid in distinction between two closely spaced regions” (*id.*).

This argument is not persuasive. While Seitz does disclose the use of color on color charts, Seitz also discloses that color can be used as a direct or indirect indication of a particular size of an absorbent article. This

disclosure, in combination with Sorkin, would have suggested to one of skill in the art putting the size-indicating color on the diapers themselves when the diapers were packaged inside Sorkin's package having a window through which the color is visible.

With regard to claim 9,⁶ Appellant argues that an "additional motivation is required to change the diapers of Sorkin to feminine hygiene articles" (Appeal Br. 6-7).

This argument is not persuasive. Seitz discloses that size (i.e., absorbency) of absorbent articles may be indicated by color and that such absorbent articles include both diapers and feminine hygiene articles. As discussed above, this disclosure in combination with Sorkin would have suggested to one of skill in the art putting the size-indicating color on the feminine hygiene articles themselves when the articles were packaged inside Sorkin's package having a window through which the color is visible.

Conclusions of Law

The evidence of record supports the Examiner's conclusion that one of skill in the art would have been motivated to combine Sorkin's colored diapers, visible through a window, with Seitz's use of color as an absorbency indicator.

⁶ Claim 9 reads: "The disposable absorbent product of Claim 1, wherein the disposable absorbent articles are feminine hygiene articles."

OBVIOUSNESS II

Issue

The Examiner has rejected claims 1-6 and 8-13 under 35 U.S.C. § 103(a) as being obvious in view of MacDonald and Seitz. Claims 2-6 and 8-13 have not been argued separately and therefore stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(vii).

The Examiner's position is that "MacDonald teaches a disposable absorbent product ... package having a window" (Answer 6) that includes a "plurality of disposable absorbent articles ... in the package" and that "MacDonald teaches an indication means disposed on the respective absorbent article" that can be seen through the window (*id.* at 7). The Examiner finds that Seitz discloses that "different colors may be used to signify different sizes of disposable diapers" and concludes that "it would have been obvious to one of ordinary skill in the art ... for the packaged diapers of MacDonald to be modified to include the color of the diaper corresponding to a predetermined absorbency, as taught by Seitz" (*id.* at 7-8).

Appellant contends that there is no motivation to combine the cited references to arrive at the invention of claim 1 (Appeal Br. 8).

The issue with respect to this rejection is: Does the evidence of record support the Examiner's conclusion that one of skill in the art would have been motivated to combine MacDonald and Seitz to arrive at the invention of claim 1?

Additional Findings of Fact

5. MacDonald discloses

a flexible polymer packaging bag. ... A stack of articles are contained in the interior space and ... each one of the articles comprises a front panel, a back panel, and a graphic on one of the panels. A window is in one of the walls and has a periphery that substantially frames at least a portion of the graphic.

(MacDonald, col. 2, ll. 9-17.)

6. MacDonald discloses that articles in the packaging may be training pants and other disposable absorbent articles such as “diapers, feminine care products,” etc. (*id.* at col. 2, ll. 56-66).

Analysis

Claim 1 is set forth above. MacDonald discloses a diaper package that has a window such that a graphic on the diapers can be seen through the window. Seitz discloses that diaper size, i.e., absorbency, may be identified by color. In view of these disclosures, it would have been obvious to one of skill in the art to modify the MacDonald diaper package to have the graphic include a color, viewable through the window, that indicates a particular absorbency because doing so would provide the product with a readily recognizable absorbency indicator. Thus, it would have been obvious for one of skill in the art to combine the cited references and thereby arrive at the invention of claim 1.

Appellant contends that there is no motivation to combine the cited references to arrive at the invention of claim 1 (Appeal Br. 8).

This argument is not persuasive. As set forth above, diaper packages having graphics visible through a window and the use of color as an absorbency indicator for diapers were both known in the art. In accord with *KSR*, combining the known diaper package with the known use of color as

an absorbency indicator would appear to be nothing more than the predictable use of known prior art elements according to their established functions.

The Examiner has also rejected claims 7 and 14-18 under 35 U.S.C. § 103(a) as being obvious in view of MacDonald, Seitz, and Roach.⁷ Claims 14-18 have not been argued separately and therefore stand or fall with claim 7. 37 C.F.R. § 41.37(c)(1)(vii).

The Examiner's position is that it would have been obvious to one of ordinary skill in the art ... to modify the invention of MacDonald to have the color correspond to the absorbency, as taught by Seitz ... and to include a colored wrapper for the absorbent article as taught by Roach, to conceal and protect the absorbent article and provide an aesthetically pleasing appearance (Answer 10-11). We agree with the Examiner's reasoning and conclusion.

Appellant argues that Roach does not cure the deficiencies of MacDonald and Seitz in suggesting the invention of claim 1, from which claim 7 depends (Appeal Br. 9).

This argument is not persuasive because, for the reasons discussed above, we find that the combination of MacDonald and Seitz would have suggested the invention of claim 1.

⁷ Claim 7 reads: "The disposable absorbent product of Claim 1, wherein each of the disposable absorbent articles includes an individual flexible wrapper which wraps or contains the respective absorbent article, the wrapper comprises a wrapper indication means comprising a color, the wrapper indication means being a same or similar color to said color of said indication means for said absorbent article."

Conclusions of Law

The evidence of record supports the Examiner's conclusion that one of skill in the art would have been motivated to combine the cited references to arrive at the invention of claim 1.

SUMMARY

We affirm the rejection under 35 U.S.C. § 103(a) of claims 1-4, 6, and 9 as being obvious in view of Sorkin and Seitz, the rejection of claims 1-6 and 8-13 as being obvious in view of MacDonald and Seitz, and the rejection of claims 7 and 14-18 as being obvious in view of MacDonald, Seitz, and Roach.

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

cdc

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